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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

U.S. TRUST CORPORATION,

Petitioner,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NEW YORK CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION

JOHN L. WARDEN
Counsel for The New York Clearing House Association,
Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-4000

H. RODGIN COHEN
ROBERT A. SACKS
SULLIVAN & CROMWELL
Of Counsel

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This brief is filed under Rule 36.1 of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The New York Clearing House Association is an association of twelve leading commercial banks in the City of New York, each of which is owned by a bank holding company subject to regulation under the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841,

et seq. (1983) (the "Act" or the "BHC Act").[1] The Association clears commercial drafts and items and operates electronic transfer systems in the New York City area; through its counsel, it appears as *amicus curiae* before this Court and other appellate courts in cases that raise important questions of law affecting commercial banks, bank holding companies or their affiliates.

The bank holding company organizations of which the Association's members are a part have a strong and direct interest in being able to compete throughout the Union, free of restrictions not enacted by Congress. The decision of the court of appeals interdicts such competition without statutory warrant.

Summary of Argument

This case presents a straightforward and important question of federal law that can only be settled by this Court: Whether the BHC Act shall be enforced in accordance with its terms. The judicial revision proposed by Florida and adopted by the court of appeals would prevent the limited interstate competition by bank holding companies authorized by Congress and would sweep under the Act's coverage dozens of firms owning depository institutions not heretofore classified as banks. The consequences, both juridical and commercial, are serious and fully warrant the exercise of this Court's jurisdiction.

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[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Irving Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, and European American Bank.

Moreover, the court of appeals' decisional process so far departs from that prescribed by this Court and the result reached so flatly conflicts with this Court's decision in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), as to call for the exercise of this Court's power of supervision and for correction by summary reversal. This Court has left no room for doubt that statutes are to be enforced as enacted by Congress and not subjected to judicial revision, and yet the court of appeals excised half of the BHC Act's definition of "bank," 12 U.S.C. § 1841(c), simply for policy reasons. The acknowledged purpose of this excission was the application of the Douglas Amendment, 12 U.S.C. § 1842(d)(1), to activities conducted under Section 4(c)(8) of the Act, 12 U.S.C. § 1843 (c)(8)—a result which literally defies the holding of *Lewis*.

ARGUMENT

I.

The Issue Raised by This Case Is Important, Has Wide Impact and Should Be Settled Now.

The Federal Reserve Board has correctly represented to the Court that the application of the BHC Act to so-called "nonbank banks" is "a question of paramount importance to the operation and structure of the nation's banking system." Petition for Certiorari at 8, *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274, *cert. granted*, 105 S. Ct. 2173 (1985). The context in which that question is here raised is considerably more consequential than that presented by *Dimension*.

Dimension involves the Board's power further to interpret by its Regulation Y the two characteristics Congress

has prescribed as together defining a "bank" under the Act: the acceptance of demand deposits and the making of commercial loans. This case, in contrast, involves the continued validity of the congressional definition itself, regardless of its further articulation—proper or improper—in Regulation Y.[2]

The definition of "bank" is the predicate both for the Act's definition of "bank holding company," 12 U.S.C. § 1841(a)(1), and for the application of the Douglas Amendment's restriction on interstate banking, 12 U.S.C. § 1842(d)(1). Thus, one effect of the Eleventh Circuit's decision would be to classify as "banks" hundreds of industrial banks and other institutions which accept demand deposits but do not make commercial loans, and as illegal "bank holding companies" dozens of firms outside the banking industry,[3] even if those firms limit the loan activities of their depository subsidiaries so as to comply fully with whatever limitations regarding "commercial loans" may validly be imposed by the Board.[4] Resulting application

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[2] The Board found petitioner's application to comply fully with Regulation Y (A20). ("A" citations are to the Appendix to the Petition for Certiorari.)

[3] According to the Board's petition in *Dimension* at 23 n. 17, such firms include "Sears, Roebuck & Co.; J. C. Penney & Co., Inc.; Shearson/American Express, Inc.; Dreyfus Corp.; Merrill Lynch & Co., Inc.; Prudential-Bache Securities, Inc. and similar entities."

[4] The court of appeals did not recognize this effect of its decision and may have believed that it was dealing only with the interstate activities of registered bank holding companies. Thus, in a footnote attempting to distinguish the Tenth Circuit's decision in *Dimension* (A13 n. 15), the court recognized that the Tenth Circuit had held Congress intended to allow the development of nonbank banks, without subjecting such institutions to the BHC Act's provisions regarding banks, but said the Tenth Circuit had not ruled "specifically on whether nonbank banks could be established without regard to the Douglas Amendment."

(footnote continued on following page)

of the Act's basic divestiture provisions, 12 U.S.C. § 1843 (a)(2), would create dislocations in the economy. The decision will, moreover, have the effect, recognized and intended by the court of appeals, of arresting interstate expansion of bank holding companies under Section 4(c)(8), although Congress prescribed no such limitation (A6, A35).

Here, even more so than in *Dimension,* the court of appeals' decision "will have a nationwide impact" and "far-reaching consequences." *See* Petition for Certiorari at 24, *Dimension, supra.* Indeed, should the decision below stand, the validity of Regulation Y's definition of commercial loans, which is at issue in *Dimension,* will be a moot question. Review by this Court is therefore warranted at this time.

II.

The Court Should Reverse Summarily.

This Court's function as the ultimate repository of the judicial power under Article III cannot be discharged if its decisions are not followed by the lower federal courts and the state courts. Indeed, such "nullification" of this Court's decisions by other courts is the ultimate negation of the rule of law. When it occurs, as it has here, the appropriate remedy is not reversal after full briefing and argument on this Court's crowded plenary calendar, but summary reversal pursuant to Rule 23.1.

(footnote continued from preceding page)

The defined statutory term "bank" cannot have different meanings under Section 1841(a)(1) and Section 1842(d)(1), however, and it would be absurd to suggest that Congress sought to curb interstate ownership of depository institutions by regulated bank holding companies and to leave uncontrolled such ownership by unregulated industrial and commercial companies.

A.

In *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), this Court decided the very question presented here: Whether the "policy" of the Douglas Amendment requires its application to institutions other than "banks" as defined in the BHC Act. The Court there recognized and respected the carefully-drawn distinction in the BHC Act between acquisitions of banks and acquisitions of institutions which provide banking services but are not BHC Act "banks." The former, which are governed by Section 3, are subject to the Douglas Amendment; the latter, which are governed by Section 4, are not subject to the Douglas Amendment. *Id.* at 47. Thus, *Lewis* directly controls this case and requires reversal.[5]

The court of appeals relegated *Lewis* to a footnote (A15 n.17), and sought to avoid its application on the ground that "deposit-taking institutions" are "banks," the BHC Act to the contrary notwithstanding. The court thus chose simply to disregard a recent, unanimous and controlling decision of this Court, as well as to revise the Act as enacted by Congress, by the simple expedient of reclassifying a Section 4(c)(8) subsidiary as a Section 3 "bank." Such a decisional process is wholly unacceptable.

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[5] The policy arguments advanced by Florida and its banking establishment in this case and accepted by the court of appeals were made by the same parties in *Lewis* and there rejected by this Court. *See* 447 U.S. at 38-39, 42-44, 47-48 n. 13; Oral Argument of Erwin N. Griswold, Esq., for Appellant, *Lewis* v. *BT Investment Managers, Inc.*, No. 79-45, Transcript at 19-20.

B.

Congress defined a "bank" for purposes of the BHC Act as

> "any institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

12 U.S.C. § 1841(c); *see Northeast Bancorp* v. *Board of Governors,* 105 S. Ct. 2545, 2548 (1985); *see also* 12 C.F.R. § 225.2(a)(1). The second of the two requisities, *i.e.*, engaging "in the business of making commercial loans," was added by amendment in 1970 for the express purpose of excluding from the Act's coverage "institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans." S. REP. NO. 1084, 91ST CONG., 2d Sess. 24, *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 5519, 5541.[6]

The Board, in its decision approving petitioner's application (A18-A25), held unequivocally that the "Act defines a 'bank' as an institution that both accepts demand deposits and engages in the business of making commercial loan;" that the Board itself had already acted by means of Regulation Y "to bring within the scope of the Act those institutions that the Board believes Congress intended to subject to the Act's limitations on conflicts of interest,

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[6] Moreover, Congress has elsewhere expressly recognized that there are depository institutions which are *not* commercial banks and has regulated them together with commercial banks when it has deemed such regulation necessary. Thus, the Depository Institution Management Interlocks Act, 12 U.S.C. § 3201, *et seq.* (1983), includes the following definition determining the scope of the act: "the term 'depository institution' means a commercial bank, a savings bank, a trust company, a savings and loan association, a building and loan association, a homestead association, a cooperative bank, an industrial bank, or a credit union." 12 U.S.C. § 3201(1).

concentration of resources, and excessive risk;" and that, giving full effect to Regulation Y, petitioner's Florida subsidiary "will not be a bank within the meaning of the Bank Holding Company Act" (A20). The Board's interpretation and application of the Act "is entitled to the greatest deference." *Board of Governors* v. *Investment Company Institute,* 450 U.S. 46, 56 (1981) (footnote omitted).[7]

Both the language used by Congress in defining a "bank" under the BHC Act and its specific purpose in using such language are entirely clear and were found to be so by the agency charged with enforcing the Act. The court of appeals nonetheless refused to apply the statute according to it terms, offering as its only justification for this remarkable departure from "the accepted and usual course of judicial proceedings," *see* Rule 17.1(a), the precept that Congress did not know what it was doing when it amended the definition of "bank" in 1970 and thought it was only providing a special exception for the Boston Safe Deposit and Trust Company (A10 & n.10, A13).[8] It is not Congress' custom, however, to create statutory categories that are available only to favored persons and not to others who are identically situated, and Congress did not depart from custom here—it excluded *all* depository institutions that do not make commercial loans from the BHC Act's defini-

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[7] The court of appeals' comment that the Board failed to carry out its role as "Congress' custodian of the Act" (A17), simply ignores that the Board did in fact exercise its proper function by giving effect to the unambiguous language Congress chose to employ.

[8] To support its view of Congress' limited awareness and purpose, the court of appeals relies solely upon a few selected statements made during the course of congressional hearings on the 1970 amendment to the BHC Act (A9, A10 & n.10), disregarding both the plain language of the Senate report and other elements of the legislative history. *See* Petition for Certiorari at 12-15.

tion of "bank." It is not for the courts to revise the statute in order to protect Congress and the public from what Congress wrought. *Sedima, S.P.R.L.* v. *Imrex Co.*, 105 S. Ct. 3275, 3287 (1985); *Barr* v. *United States*, 324 U.S. 83, 90 (1945).

This Court's decisions absolutely mandate that in the circumstances here present, the judicial function be limited to applying the statute as written, and not extended to revision, excission, supplementation, or dispensation in the name of better securing some supposed general "policy" or "purpose." *Securities Industry Association* v. *Board of Governors*, 104 S. Ct. 2979, 2988 (1984); *Badaracco* v. *Commissioner*, 104 S. Ct. 756, 764 (1984); *BankAmerica Corp.* v. *United States*, 462 U.S. 122, 128-29 (1983); *Central Trust Co.* v. *Official Creditors Committee of Geiger Enterprises*, 454 U.S. 354, 359 (1982); *Maine* v. *Thiboutot*, 448 U.S. 1, 6 n.4 (1980); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978); *United States* v. *American Trucking Association*, 310 U.S. 534, 543 (1940).

Conclusion

For the reasons stated, the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit should be granted and that judgment should be reversed summarily.

Respectfully submitted,

JOHN L. WARDEN
Counsel for The New York Clearing House Association,
Amicus Curiae
125 Broad Street,
New York, New York 10004.
(212) 558-4000

H. RODGIN COHEN
ROBERT A. SACKS
SULLIVAN & CROMWELL
Of Counsel

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